

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP405-CR

Cir. Ct. No. 2009CF174

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE J. SLAMA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
JAMES MILLER, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Terrence Slama appeals his judgment of conviction and sentence, entered after he was found guilty following a jury trial of three counts of sexual assault. On appeal, Slama argues that he was denied his constitutional right to present a defense when the circuit court denied his pre-trial

motion to introduce evidence that the victim had sexual intercourse with another individual approximately twenty-four hours before the alleged assault by Slama. For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

¶2 A.R. worked as a bartender at Roadhouse 51, a bar owned by Slama. On the night of Friday, January 23, 2009, A.R., Slama, and another bartender from Roadhouse 51 went out to dinner and several bars together as part of a late Christmas party. A.R. and Slama both testified that they had been drinking. At or around 12:30 a.m., A.R. and Slama went to Roadhouse 51. A.R. testified that she had been in no position to drive home. Slama walked her back to his apartment, which was attached to the bar and laid her on his bed.

¶3 According to A.R.'s testimony, Slama left her alone in the apartment while he returned to the bar. A.R. crawled to the bathroom and vomited. She testified that her next clear memory was of being in Slama's bed and awaking to him rubbing her crotch through her pants. She tried to move and speak, but could not do so and drifted out of consciousness. A.R. testified that when she awoke again, Slama was removing her pants and touching her vaginal area, causing her pain. She then lost consciousness and awoke to Slama performing oral sex on her, again causing her pain. She testified that, after losing consciousness again, she woke up to Slama on top of her and to pain caused by Slama penetrating her vagina with his penis. She rolled onto her side, at which point Slama stopped what he was doing and said, according to A.R.'s testimony, "something along the lines of okay, okay, I will stop raping you now." A.R. passed out again and, when she awoke, she felt something being inserted into her anus. A.R. asked Slama why she was naked. She testified that Slama then became apologetic.

¶4 Slama's trial testimony differed from A.R.'s. According to Slama, when he returned to his apartment after leaving the bar, he found A.R. standing in the living room. He testified that they walked to the bed, removed one another's pants, and engaged in "a lot of making out" before A.R. "snapped" at him and accused him of rape. Slama admitted to touching A.R.'s clitoris with his tongue and mouth and inserting a finger inside her vagina.

¶5 A.R. was examined by a sexual assault nurse examiner on the morning of January 24, 2009. The nurse examiner who examined A.R. found abrasions in A.R.'s genital area and redness on her shoulder. The nurse examiner testified that, in her opinion, the injuries did not occur during consensual sex, but were consistent with forceful penetration.

¶6 Semen was found on the crotch panel inside of A.R.'s underwear, extending toward the front of the crotch area. Male DNA was present in the sample taken from the underwear stain, but the amount of DNA was insufficient for conclusive testing to identify a specific contributor. Male DNA was also present in samples taken from A.R.'s cervix, vagina, neck, and fingernails, but again the amount of DNA present in the samples was insufficient for conclusive testing.

¶7 DNA samples from two stains on the inside of Slama's underwear and a swab of his penis yielded a mixture of DNA attributable to Slama and to A.R. The forensic scientist who performed the DNA testing testified at trial that the probability that some of the DNA mixture profile obtained from Slama's underwear came from an individual other than A.R. was one in 135,000 for one of the stains and one in 29,000 for the other stain. Regarding the sample obtained

from a penis swab of Slama, the forensic scientist testified that the probability was one in 48,000 that the DNA came from someone other than A.R.

¶8 A criminal complaint and information were filed against Slama as a result of the incident with A.R. The first count of the information charged Slama with second-degree sexual assault, involving penis to vagina contact, of a person under the influence of an intoxicant. The second and third counts also charged Slama with second-degree sexual assault of an intoxicated person, but alleged mouth to vagina contact and touching of the vagina, respectively. The fourth count charged Slama with second-degree sexual assault of an intoxicated person, involving finger to anus contact.

¶9 Prior to trial, Slama filed a motion in limine seeking to introduce evidence that A.R. had consensual sex with a different man approximately twenty-four hours prior to the alleged assault. In support of the motion, defense counsel submitted his own affidavit, which very briefly summarized a statement made by A.R. to police about the prior sexual conduct. After a hearing, the circuit court ruled that Slama's offer of proof failed to satisfy the test under *State v. Pulizzano*, 155 Wis. 2d 633, 656-57, 456 N.W.2d 325 (1990), for admitting evidence of a victim's prior sexual conduct.

¶10 Following a trial, a jury found Slama guilty of second-degree sexual assault as to counts 1 and 2 of the information, which alleged penis to vagina contact and mouth to vagina contact. The jury found Slama guilty of fourth-degree sexual assault as to count 3, which alleged touching of the vagina. The jury found Slama not guilty as to count 4, which alleged finger to anus contact. Slama now appeals.

STANDARD OF REVIEW

¶11 The question of whether a circuit court erred when it admitted or excluded evidence is subject to an erroneous exercise of discretion standard. *State v. Nelis*, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619. We will sustain an evidentiary ruling if we find that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion of law that a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Whether the circuit court relied on applicable law in making an evidentiary ruling is a question of law. *State v. Rhodes*, 2011 WI 73, ¶¶22-26, 336 Wis. 2d 64, 799 N.W.2d 850.

DISCUSSION

¶12 Wisconsin's rape shield law, WIS. STAT. § 972.11(2)(b) (2011-12),¹ prohibits a defendant from offering evidence related to a victim's prior sexual conduct. However, in some cases, a victim's prior sexual conduct may be so relevant and probative that to bar evidence of such conduct would deny the defendant his constitutional right to present a defense. *Pulizzano*, 155 Wis. 2d at 647.

¶13 Slama argues that A.R.'s statement that she had sexual intercourse with a different man twenty-four hours before the incident with Slama should have been admitted to show a possible alternative basis for injury and male DNA obtained from A.R.'s underwear and body. Slama correctly asserts that a statutory

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

exception to the rape shield law allows admission of “[e]vidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.” WIS. STAT. § 972.11(2)(b)2. However, the admission of such evidence is subject to the limitation set forth in WIS. STAT. § 971.31(11), which states that the evidence “must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.” § 971.31(11).

¶14 To the extent that Slama argues that A.R.’s prior sexual conduct is relevant in determining the extent of her injuries, we note that Slama does not explain his contention or develop this argument. We decline to develop his argument for him. *See* WIS. STAT. RULE 809.19(1)(d) and (e) (setting forth the requirements for briefs); *see also* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack “sufficient merit to warrant individual attention”). Because Slama’s briefs focus on his argument that the victim’s prior sexual conduct could have provided an alternative source for male DNA, we will focus on that argument in our analysis.

¶15 The framework for a defendant trying to establish a constitutional right to present otherwise excluded evidence of a victim’s prior sexual conduct is set forth in ***Pulizzano***, 155 Wis. 2d at 656-57. The defendant must make an offer of proof showing: “(1) that the prior act clearly occurred; (2) that the act closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant’s case; and (5) that the probative value of the evidence outweighs its prejudicial effect.” *Id.*

¶16 The circuit court applied the *Pulizzano* factors in deciding to exclude evidence of A.R.'s recent sexual contact with another man. Applying the first factor, the circuit court found that the prior act clearly occurred. We are satisfied with this conclusion because the record indicates that A.R. told police that she had intercourse with another individual the prior night.

¶17 We disagree, however, with the circuit court's conclusion that the two acts were dissimilar because the first sexual encounter was consensual whereas the second encounter was nonconsensual. For purposes of determining whether there was an alternative source of male DNA, we conclude that the two acts resembled one another in the way that matters here: both were sexual encounters between A.R. and a male.

¶18 Nonetheless, we are satisfied with the court's application of the remaining *Pulizzano* factors to this case. Applying the third and fourth factors, the circuit court concluded that the prior act was not clearly relevant to a material issue and was not necessary to Slama's case. In light of all the evidence in the record, we agree.

¶19 Slama did not deny having extensive sexual contact with A.R.; rather, he argued that the contact was consensual. A.R.'s consensual sexual intercourse with another male in the previous twenty-four hours is not relevant to the issue of whether or not her sexual contact with A.R. was consensual. We also reject Slama's argument that evidence of A.R.'s prior sexual conduct is relevant or necessary to show an alternative source for the male DNA obtained from her underwear and body. Slama admitted that he touched A.R.'s clitoris with his mouth and tongue and inserted a finger into her vagina. In addition, DNA that was identified, within a statistical range of high certainty, as being from A.R., was

found on Slama's penis as well as in the crotch area of his underwear. As to the semen stains that were also found in the crotch area of A.R.'s underwear, A.R. testified that, at about 4:00 p.m., before she met Slama and another co-worker for the late Christmas party, she showered and put on a clean pair of underwear. A.R.'s acts of showering and putting on clean underwear in between the prior, consensual sexual intercourse and the later incident with Slama render the probative value of her statement regarding her prior sexual conduct extremely low.

¶20 Turning, then, to the fifth factor from *Pulizzano*, 155 Wis. 2d at 656-57, we agree with the circuit court's conclusion that the evidence of A.R.'s prior sexual conduct would have been prejudicial. Evidence of the prior sexual conduct may have steered the jury to make a propensity inference, prohibited by WIS. STAT. RULE 904.04(1), that A.R. had a character for promiscuity and acted in conformity with that character trait.

¶21 In sum, we conclude that the circuit court did not erroneously exercise its discretion in excluding evidence of A.R.'s prior sexual conduct on the grounds that Slama's offer of proof did not satisfy the factors set forth in *Pulizzano*, 155 Wis. 2d at 656-57. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

